In The Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-1381

MIAMI COPPER COMPANY DIVISION, TENNESSEE CORPORATION,
Petitioner

VERSUS

STATE TAX COMMISSION OF THE STATE OF ARIZONA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA, DIVISION TWO

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA, DIVISION TWO

Miami Copper Company Division, Tennessee Corporation, petitions for a Writ of Certiorari to review the decision and opinion of the Court of Appeals, Division Two, of the State of Arizona ("Arizona Court of Appeals") entered in this case on September 20, 1978. Cities Service Company, a Delaware corporation, is successor to Miami Copper Company Division, Tennessee Corporation, by merger effective January 2, 1970.

OPINIONS BELOW

The decision and opinion of the Arizona Court of Appeals is reported at 589 P.2d 24. The opinion of the Arizona Court of Appeals is reproduced at Appendix A.

JURISDICTION

The decision and opinion of the Arizona Court of Appeals was entered on September 20, 1978. A Motion for Rehearing was filed in the Arizona Court of Appeals by Petitioner on October 20, 1978, which Motion was denied by the Arizona Court of Appeals on November 22, 1978. A Petition for Review of the decision of the Arizona Court of Appeals by the Supreme Court of Arizona was filed by Petitioner on November 30, 1978. The Petition for Review was denied by the Supreme Court of Arizona on December 12, 1978, and this Petition is filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Section 1 of the Fourteenth Amendment of the United States Constitution.

QUESTIONS PRESENTED

1. Was the Petitioner denied equal protection of the laws by assessment of the Arizona transaction privilege tax on that part of the value of Petitioner's copper products attributable to smelting services contracted for by Petitioner, where the assessment resulted in an unequal taxation of Petitioner's copper production as compared to copper producers which refined their copper by integrated smelting activities?

2. Whether the Arizona Court of Appeals erred in reversing the Judgment of the Superior Court of Gila County, Arizona, entered December 6, 1977, which is reproduced at Appendix B; and whether the Supreme Court of Arizona erred in denying the Petitioner's Petition for Review of the Decision of the Arizona Court of Appeals.

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution; and Sections 42-1309, 42,1310, 42-1311 and 42-1316 of the Arizona Revised Statutes are involved, and are reproduced at Appendices C and D, respectively. Section 2.2.6 of the Arizona State Tax Commission Regulations is involved and is reproduced at Appendix E.

STATEMENT

The questions presented primarily involve legality of the imposition by the Respondent, State Tax Commission of the State of Arizona, of the Arizona transaction privilege tax to the total value of copper products shipped by Petitioner out of the state of Arizona during the period October 1, 1964 through May 31, 1967, which value included an increment for smelting services which were obtained by Petitioner through contract with other companies in Arizona.

In its verified Complaint to the Superior Court of Gila County, Arizona, Petitioner alleged that the transac-

tion privilege tax was also imposed on such contractors for the charges they received for smelting performed for Petitioner, and that the charges or fees paid to the contractors by Petitioner included an allowance for the amount of taxes due to the State from the smelting contractors.[1] The Respondent denied this allegation in its Amended Answer. The case was decided for the Petitioner by the Superior Court on Motion for Summary Judgment before presentation of evidence relative to any transaction privilege tax paid by the contractors and charged by them to Petitioner.

The Petitioner was engaged in the business of mining and producing copper concentrates and copper precipitates from its mines located in Gila County, Arizona, and these materials were delivered to Inspiration Consolidated Copper Company, Miami, Arizona ("Inspiration"), and Phelps Dodge Corporation, Douglas, Arizona ("Phelps Dodge"), to be smelted for a per-ton fee, thereby producing blister copper. The blister copper of Petitioner was shipped directly out of Arizona from the plants of the smelting contractors. The transaction privilege tax was imposed on Petitioner by the Respondent for the total value of the blister copper, which included the value added by the smelting activity for which the contractors were also taxed.

Other copper mining and producing concerns within the state of Arizona, including Inspiration and Phelps

[1]Paragraphs XIV and XV 8, of Petitioner's Complaint filed in the Superior Court of Gila County, Arizona, reproduced at Appendix F.

Dodge, engaged in the production and sale of copper, as did Petitioner. Their operations in producing and selling blister copper were integrated, in that they owned and operated both mines and smelting facilities and to that extent differed from Petitioner's operations which did not include integrated smelting facilities. Integrated producers did not need to contract for smelting and thus did not have the tax imposed twice on the smelting activity involved in their copper production.

After auditing the Petitioner in 1967, the Respondent assessed additional transaction privilege taxes and educational excise taxes against Petitioner for the period October 1, 1964 through May 31, 1967, in the total amount of $169,648.54. The basis for the assessment was the Respondent's disallowance of Petitioner's deduction of smelting charges, refining charges, domestic freight and insurance charges incurred by Petitioner. On February 29, 1968 Petitioner paid $577.49 of the additional assessment attributable to miscellaneous small charges. Petitioner sought administrative review and redetermination of the unpaid amount of the assessment. Upon hearing, the assessment was amended by the Respondent to $65,815.45, which was based upon a denial of Petitioner's claimed deduction of smelting charges incurred by it in processing its copper before shipment from Arizona. Petitioner paid the deficiency under protest and, on February 28, 1969, brought suit in the Superior Court of Gila County, Arizona, challenging the additional assessment.

On cross motions for summary judgment, the Superior Court of Gila County, Arizona entered Judgment for Petitioner on December 6, 1977 for the amount of the tax which Petitioner had paid under protest. (Appendix B)

The Respondent appealed from the Judgment to the Arizona Court of Appeals on January 24, 1978. The Arizona Court of Appeals reversed the trial court's decision on September 20, 1978, vacated that portion of the trial court's Judgment upholding Petitioner's deduction of in-state smelting charges, and directed the trial court to enter judgment in favor of the Respondent. Its Opinion (Appendix A) included a determination that the transaction privilege tax and its application to Petitioner in this case were "within the constitutional obligation of the State of Arizona to treat equally essentially similar activities."

Petitioner made timely filing of a Motion for Rehearing in the Arizona Court of Appeals on October 20, 1978, which was amended on October 24, 1978. The Petitioner's Motion for Rehearing, as amended, is reproduced at Appendix G. The Arizona Court of Appeals denied the Petitioner's Motion for Rehearing on November 22, 1978. The denial of the Motion for Rehearing is reproduced at Appendix H.

Petitioner filed a Petition for Review by the Supreme Court of Arizona on November 30, 1978, which is reproduced at Appendix I. The Supreme Court of Arizona

denied Petitioner's Petition for Review on December 12, 1978, thereby concluding Petitioner's rights to appellate review in the courts of the State of Arizona. The Supreme Court of Arizona's denial of the Petition for Review is reproduced at Appendix J.

Judgment of the Superior Court

In the Superior Court of Gila County, Arizona the Petitioner asserted in paragraph XV.8. of its Complaint (Appendix F), and in paragraph 5 of the Memorandum of Points and Authorities attached to its Motion for Summary Judgment (Appendix K), that the application of the transaction privilege tax to the increment of value for smelting services included in total taxable value of its copper products would be a denial of equal protection of the laws. Petitioner asserted that imposition of the tax on that portion of the value of its products is discriminatory when compared to the transaction privilege tax burden imposed on certain other mining concerns subject to the tax which do smelting by integrated operations, and do not need to pay smelting charges to outside contractors which would include the tax. The Superior Court's Judgment determined the case in favor of Petitioner. (Appendix B)

Decision of the Arizona Court of Appeals

In its Opinion reversing the Judgment of the lower court (Appendix A), the Arizona Court of Appeals discussed the nature of the transaction privilege tax and the basis of its assessment on Petitioner's shipments of

copper from the state of Arizona. It stated the four bases on which Petitioner prevailed in the lower court, one of which was that the inclusion of value added by smelting denies Petitioner equal protection of the law. The Court then determined that Petitioner's smelting charges are required to be included in the value of its copper when shipped from Arizona in that such smelting was a part of the business activities of Petitioner, and that prior administrative practice under which the tax was not assessed on smelting charges added to Petitioner's copper did not constitute a binding construction of the statute by the State or preclude assessment of the taxes in issue. The Court concluded that no "double taxation" was involved in the assessment of the tax to Petitioner, as different persons were being assessed, they being Petitioner and the smelting contractor.

Finally, the Court found that equal protection of the law was not denied Petitioner since the State of Arizona was assessing the tax equally to all smelting activities within the state. The Court stated that merely because a similarly situated taxpayer might have smelting done outside Arizona and thereby obtain a lower tax basis did not mean equal protection was denied Petitioner. The Court did not specifically address the issue of equal protection of the laws in the context of a comparison of the double amount of transaction privilege tax paid on the smelting cost increment of the value of the Petitioner's products, as contrasted to the single amount of transaction privilege tax

payable on the value added to an integrated mining company's products by its smelting activity.

In its Motion for Rehearing to the Arizona Court of Appeals (Appendix G) the Petitioner again asserted that the manner in which the transaction privilege tax was imposed resulted in a denial to Petitioner of equal protection of the laws, specifically alluding to, and illustrating the comparative transaction privilege tax burdens on the production and sale of copper by Petitioner as opposed to integrated mining and smelting companies. The Motion for Rehearing was denied (Appendix H).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in Arizona is erroneous and in conflict with prior decisions of this Court.

The Arizona transaction privilege tax is assessed upon the privilege of engaging in enumerated types of business activities, including smelting. The decision of the Arizona Court of Appeals has the effect of requiring payment, as to Petitioner's copper production, of twice the amount of the tax on the business activity of smelting as is paid on the same activity in the case of an integrated mining and smelting business which sells its copper products. The Petitioner is being required to pay the tax on the incremental value added to the copper products it shipped from Arizona by the smelting it secures from others under contract. A.R.S. §42-1316. The same amount of tax was imposed upon the contractor for the smelting it performed for petitioner. A.R.S.§§42-1310, 42-1311.

Petitioner asserted on information and belief in its Complaint that the amount of transaction privilege tax so paid by the contractor was included in the contractor's charges to Petitioner for smelting services. The course of the proceedings in the trial and appeals courts below resulted in no proof being received on this point. Petitioner submits that the Arizona Court of Appeals' disposition of the case is tantamount to summary judgment for the Respondent, and, accordingly, the pleadings and record on that point should be viewed herein in a light most favorable to Petitioner. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In this regard, the Respondent acknowledged in its Response to Petitioner's Motion for Rehearing in the Arizona Court of Appeals that it is common practice for smelting contractors to pass along the burden of the tax imposed on them to their customers.[2]

In any event, it is without question that under the decision of the Arizona Court of Appeals the Petitioner's copper, which is smelted by contract in Arizona, must enter the market for such products subject to the transaction privilege tax being imposed *twice* on the value added thereto by smelting.

In contrast, a taxpayer which has integrated mining and smelting activities, and sells or ships the products thereof, pays the transaction privilege tax on the gross

[2]p. 10 of Respondent's Response to Motion for Rehearing filed in the Arizona Court of Appeals, reproduced at Appendix L.

proceeds or value of such products attributable to smelting only *once*. A.R.S. §§42-1309, 42-1310, and 42-1316.

This contrasting and different treatment of Petitioner and other taxpayers who engage in business involving identical activity — the sale and/or transporting from Arizona of mined and smelted copper products — constitutes a denial to Petitioner of equal protection of the laws guaranteed to Petitioner by the Fourteenth Amendment of the United States Constitution.

Thus, the Arizona Court of Appeals has decided a Federal question of substance in a way not in accord with applicable decisions heretofore rendered by this Court.

This Court determined early that states in the exercise of their taxing power are subject to the requirements of the equal protection clause of the Fourteenth Amendment. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The general principle of equal protection has been stated often by this Court:

> Consistently with (equal protection) the legislature of the state may exercise a wide discretion in selecting the subjects of taxation. . . . It may select those who are engaged in one class of business and exlude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 179 (1923); *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 121 (1910).

The State of Arizona has recognized this requirement for equality by providing that the value of products for

purposes of the transaction privilege tax must be ascertained by equitable and uniform rules to be prescribed by the Commissioner of the Department of Revenue. A.R.S. §42-1316. The Arizona statute under consideration establishes a classification for t. xing the privilege of engaging in certain business activities which includes "mining" and "smelting." For purposes of taxing these activities, there are no distinctions made by the statute. Therefore, it provides for a single class of taxpayer consisting of all that are engaged in the enumerated activities within the state. *Weissinger v. Boswell,* 330 F. Supp. 615 (1971).

It has never been Petitioner's contention that this statute was unconstitutional on its face. However, the equal protection clause of the Fourteenth Amendment goes beyond the face of a statute. This Court stated, in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886):

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Another court stated it differently in *Delaware L. & W. R. Co. v. Kingsley,* 189 F. Supp. 39, 46 (1960). "The Equal Protection Clause protects the individual from state action selecting him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

While the Arizona statute might appear fair and impartial on its face, the State has administered said statute through regulatory mandates in such a way as to place a burden on Petitioner not placed on other taxpayers within the same class. Petitioner is in the business of mining and producing copper, as are various other companies doing business in Arizona. However, unlike integrated companies that do their own smelting, Petitioner has been burdened with its payment of the transaction privilege tax based on the total value of its copper, which included the increment of value added by smelting, and with the added economic effect of the imposition of a transaction privilege tax on the smelting contractor measured by the same increment of value.

This discrimination against Petitioner is an overt act by the State. Prior to the years involved in the above-referenced audit, the Respondent, by regulation and practice, allowed a deduction by Petitioner for *all* smelting and refining charges. That Regulation, Arizona State Tax Commission Regulation 2.2.6, is reproduced at Appendix E. By allowing such a deduction, the charges paid to the smelterer by Petitioner were deducted from the value of its copper before Petitioner paid the transaction privilege tax on it. This allowed Petitioner to be treated uniformly with other companies within the same class. However, on December 26, 1965 the Respondent amended the Regulation and Petitioner was no longer allowed to deduct charges for contract smelting of its copper done in

Arizona. The amended Regulation is reproduced at Appendix E. Under the amended Regulation Petitioner had to operate under rules which exacted a privilege tax on the proceeds received by the smelting contractor for its smelting of Petitioner's copper, and also imposed a like privilege tax on Petitioner for the increased value of the copper resulting from the same smelting activity. Integrated companies that were engaged in the same activities as Petitioner, that of mining and producing copper, paid a transaction privilege tax under the same statute, but did not have to bear the additional burden which the amendment of the Regulation forced Petitioner to bear.

The distinction made by the Respondent's administration of this statute is without foundation. Before such a discrimination can be upheld it must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959), *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89 (1900). The object of the Arizona statute is to tax the privilege of engaging in certain business activities measured by the volume of business transacted. There is no rational link between the object of this statute and the State's administrative action which, as approved by the Arizona Court of Appeals, arbitrarily burdens the copper production of Petitioner with a greater tax because of the method it chooses to accomplish that production. In conducting its copper business the Petitioner exercises no greater or lesser privileges within the State of Arizona than those companies which sell or ship copper products produced from integrated mining and smelting operations. To place such an additional burden on Petitioner, as the Respondent has done, is therefore a failure to provide Petitioner with the equal protection of the law as prescribed by Arizona's own statute, A.R.S. §42-1316, and the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The issue presented and included within this Petition which is the result of the decision of the Arizona Court of Appeals warrants consideration by this Court in that it involves a conflict with authoritative decisions of this Court.

A Writ of Certiorari should be granted to review the decision of the Arizona Court of Appeals reversing the Judgment of the Superior Court of Gila County, Arizona, and upon review that decision should be reversed.

Respectfully submitted,

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9-20-78

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CIV 2867

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,
Plaintiff/Appellee,

v.

STATE TAX COMMISSION OF THE STATE
OF ARIZONA,
Defendant/Appellant

OPINION

Appeal from the Superior Court of Gila County
Honorable Robert E. McGhee, Judge
Cause No. 15,651-B
REVERSED

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The Attorney General
by James D. Winter
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RICHMOND, Chief Judge

On cross motions for summary judgment, the trial court ruled that appellee Miami Copper Company (taxpayer) was entitled to a refund of transaction privilege and education taxes paid under protest for the years 1964 to 1967. We reverse because we believe the trial court was in

error in finding that the proper tax basis was the value of taxpayer's product when it began its journey to the smelter.[1]

Taxpayer mines copper, which is then prepared in part by others for eventual sale out of state by taxpayer. A.R.S. §42-1309 imposes an education and privilege excise tax on ". . . business activities . . . in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income . . ." The applicable rates are set forth in §42-1310:

> "The tax imposed by subsection A of §42-1309 shall be levied and collected at the following rates:
>
> * * *
>
> "2. At an amount equal to one percent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:
>
> "(a) Mining, quarrying, smelting, or producing for sale, profit or commercial use, any oil, natural gas, limestone, sand, gravel, copper, gold, silver or other mineral product, compound or combination of mineral products . . ."

Because taxpayer's product is not sold in Arizona, its value for assessment of the tax must be established under §42-1316:

> "If any person engaging in any business classified in subdivision (a), paragraph 2 of §42-1310 ships or transports products, or any part thereof, out of the state without making sale of such products, or ships his products outside of the state in an unfinished condition, the value of the products or articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce shall be the basis for assessment of the tax imposed by paragraph 2 of §42-1310, and the commission shall prescribe equitable and uniform rules for ascertaining such value."

[1]The tax commission conceded in the trial court that taxpayer was entitled to a credit of $577.49 against future taxes and to refund in the amount of $1,463.58; it does not contest those portions of the judgment on this appeal.

As the result of an audit, the state tax commission in an amended assessment disallowed taxpayer's deduction for the period from October 1, 1964, to May 31, 1967, of in-state smelting charges from the values subject to the tax. Taxpayer paid the additional assessment under protest and then brought an action in the superior court to recover the disputed amount. The position on which taxpayer prevailed in the trial court is that:

1. Because the "business" of taxpayer is mining and not smelting, the tax should have been based on the value of copper concentrates and precipitates before they went through the smelting process.

2. A proper construction of §42-1316 permits the deduction of in-state smelting charges.

3. Interstate commerce, as contemplated by §42-1316, begins when the copper concentrates and precipitates are placed on railroad cars for delivery to the smelters.

4. Inclusion of the value added by smelting denies taxpayer equal protection of the law.

We will deal with taxpayer's various contentions in the order they are set forth above.

A.R.S. §14-1301 defines "business" as including:

> ". . . all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit, advantage, either directly or indirectly but not casual activities or sales."

Taxpayer's activities related to this appeal are as follows. From its mines in Gila County, it produces concentrates of about 27.5% copper, and precipitates of about 58.5% copper. These materials are then delivered to Inspiration Consolidated Copper Company, f.o.b. Inspiration Transfer, Miami, Arizona, and to Phelps Dodge Corporation, f.o.b. Smelting Works, Douglas, Arizona. By separate agreements with Inspiration and Phelps Dodge, the concentrates and precipitates are smelted for a per-ton service fee, producing "blister copper" of 99.5% purity. The agreements provide that the blister copper will be shipped by Inspiration to a refinery in New Jersey, and by Phelps Dodge to a refinery in El Paso, Texas. Taxpayer designates to whom the refined copper will be delivered after refining. Although it may not divert the shipment until the refining has been completed, ownership of the copper at all times remains in taxpayer.

In construing the intent of the privilege tax, "business" is to be given its ordinary definition. *Arizona State Tax Commission v. First National Bank Building Corp.*, 5 Ariz.App. 594, 429 P.2d 481 (1967). If an activity is intended to benefit an organization, it is properly con-

sidered the "business" of the organization. *See §14-1301, supra; O'Neil v. United Producers and Consumers Cooperative,* 57 Ariz. 295, 113 P.2d 645 (1941). *See also, e.g., State Tax Commission v. Ranchers Exploration and Development Corp.,* 22 Ariz.App. 480, 528 P.2d 866 (1975). Taxpayer's business includes, but is not limited to, mining. Its business extends to services required to prepare its mineral products for their intended sale, even if performed by others under contract.

In support of its second contention, taxpayer cites two bases to support its construction of A.R.S. §42-1316:

1. The commission's long-standing practice of allowing the deduction of in-state smelting charges constitutes an administrative construction of the taxing statute;

2. Including the value added by in-state smelting results in double taxation, whereas taxpayer's construction of the statute does not; the latter should therefore prevail, under common rules of construction.

We are not persuaded on either score.

An administrative construction of a statute is entitled to considerable weight. *Morris v. Arizona Corporation Commission* 24 Ariz.App. 454, 539 P.2d 928 (1975). We fail to see, however, how inaction of the tax commission constitutes a construction of the statute, favorable to taxpayer or otherwise. As evidence of an administrative interpretation, on the one hand is the affidavit of the director

of the commission's sales tax division, stating that the commission's policy has always been to allow the deduction of only out-of-state finishing costs. On the other hand, it is stipulated that for many years it has been the practice of taxpayer to deduct from its basis the costs of in-state smelting. Mere failure to collect an excise tax due on previously unassessed value, however, does not amount to construction of an unambiguous statute, forever precluding the taxing authority from taxing the additional values. *See John Ownbey Co. v. Butler,* 365 S.W.2d 33 (Tenn. 1963).

In support of its position, taxpayer relies on language from *Alvord v. State Tax Commission,* 69 Ariz. 287, 213 P.2d 363 (1950):

> "For twelve years the administrative officers enforced this law as now contended for by petitioners. During all this time the Legislature was apparently satisfied with this interpretation, otherwise, it doubtless would have clarified the statute. Administrative interpretation is not controlling, but when allowed to be operated for years the courts do give some weight to such interpretation in construing the law."
> *69 Ariz. at 292, 213 P.2d at 367.*

Although *Alvord* deals with an attempt by the commission to collect an excise tax not theretofore collected, we do not believe its holding applies to the facts before us. *Alvord* involved a construction of a section of the Excise Revenue Act of 1935, as amended, which imposed a tax on certain rental income. Soon after the initial enactment, of the statute, the question arose whether office rentals were taxable. The supreme court in *White v. Moore,* 46 Ariz. 48, 46 P.2d 1077 (1935), held that transient use was a "common thread" running through the rentals taxed which revealed a legislative intent not to tax office or mercantile rentals. The legislature then amended the statute in 1937 to include office rentals. The dispute in *Alvord* arose when the commission sought to extend the statute further by taxing rentals derived from agricultural land and dwelling houses. The court held that the 1937 amendment to the original act did not refute the "common thread" analysis of *White v. Moore,* supra; instead, the amendment merely responded to it. The court concluded that since the "common thread" analysis still obtained, and since the legislature had added only the enumerated business of renting offices, the attempt to include all businesses collecting rents within the purview of the act violated the legislative intent as clearly established by the history of the legislation and its interpretation by the courts and the administrative officers.

Contrary to the situation in *Alvord,* in this case a plain reading of §42-1316 leads us to conclude that the intent of the legislature was to tax any value attributable to in-state activity. The hiatus in the tax commission's effectuation of that intent does not diminish its existence or clarity.

Taxpayers alternative argument is that because the smelting activity of Inspiration and Phelps Dodge is also subject to a privilege tax, to impose a tax on taxpayer in-

cluding the value added by the smelting results in double taxation. We do not agree. Double taxation occurs "when the same property or person is taxed twice for the same purpose for the same taxing period by the same taxing authority . . ." *Milwaukee Motor Transportation Co. v. Commissioner of Taxation,* 193 N.W.2d 605, 612 (Minn. 1971). In the case before us, different "persons" are being taxed for different privileges. Inspiration and Phelps Dodge are taxed for the privilege of operating a smelter within the state, while taxpayer is taxed for the privilege of mining and preparing for sale the products it mines. *Cf. Boise Bowling Center v. State,* 93 Idaho 367, 461 P.2d 262 (1969).

In addition to its construction arguments, taxpayer also contends that a change in the commission's regulations is an impermissible alteration of the statute as drafted by the legislature. Prior to 1965, regulation 22.6 read: "The value [of a mineral product sold out of state] shall be the market price before shipment or the sale price when sold, less the cost of freight and cost of finishing the product when included in the sale price." After 1965, the same regulation read: "The value shall be the price before shipment or the sale price when sold, less the cost of freight and the cost of finishing the product *when performed outside of Arizona* and included in the sale price. [Emphasis added.]"[2] We believe the change merely

[2]The regulation has since been amended again, effective August 1, 1976. *See A.C.C.R.* R15-5-905.

clarified the method of ascertaining the product's taxable value, in accordance with §42-1316, as of its entry into interstate commerce.

We next must determine when, as a matter of law, taxpayer's copper entered interstate commerce. Activities which are more closely related to manufacture than transport are essentially local, and may not be considered part of interstate commerce. *See Utah Power & Light Co. v. Pfost,* 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038 (1932). Where it is not intended that a product is to be transported out of state until it has been subjected to a manufacturing process that materially changes its character, utility, and value, the movement of the product to the point of processing is not part of interstate commerce. *Arkadelphia Milling Co. v. St. Louis S.W. Ry.,* 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919).

Taxpayer attempts to distinguish those cases involving products which in varying degrees were not committed prior to processing to eventual movement beyond the taxing state. It is well established, however, that intent to export to another nation or state does not alone determine whether in fact the goods have become exports or have entered interstate commerce. *See Kosydar v. National Cash Register,* 417 U.S. 62, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); *Coe v. Errol,* 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886).

The reasoning behind the rule is well stated in *Heisler*

v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922).

> ". . . If the possibility, or *indeed certainty,* of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production. [Emphasis added.]"
>
> 260 U.S. at 259-60, 43 S.Ct. at 86, 67 L.Ed. at 243.

From the foregoing, we conclude that the taxpayer's mineral products did not enter interstate commerce at any time before completion of the smelting process in Arizona. A taxpayer may not immunize from taxation the value added to his product merely because it was committed to eventual out-of-state consumption or sale before it was subjected to local processing or manufacture. Taxpayer's copper did not enter interstate commerce as that term is contemplated by A.R.S. §42-1316 until it began its journey to the New Jersey and Texas refineries.

Finally, we do not agree that the foregoing construction of the pertinent statutes results in a denial of equal protection. Taxpayer's argument is that if value added by in-state smelting is subject to the tax, while value added by out-of-state smelting would not be, a taxpayer whose copper is smelted in Arizona is denied equal protection of the law. What a person chooses to do in another state, whatever his reasons, is not relevant to the validity of A.R.S. §§42-1309, et seq., which purport the tax only that value which is attributable to activities within this state. The constitutional obligation of Arizona is to treat equally essentially similar activities carried on within its borders.

That portion of the judgment upholding the taxpayer's deduction of in-state smelting charges is vacated and the trial court is directed to enter judgment in favor of the tax commission.

Reversed.

JAMES L. RICHMOND, Chief Judge

CONCURRING:

LAWRENCE HOWARD, Judge

JAMES D. HATHAWAY, Judge

APPENDIX B

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF GILA

No. 15,651-B

MIAMI COPPER COMPANY
DIVISION, TENNESSEE CORP.,

Plaintiff

vs.

STATE TAX COMMISSION OF ARIZONA

Defendant

JUDGMENT

This cause having come on to be heard on August 29, 1977, on motions of both Defendant and Plaintiff for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure for the Superior Courts of Arizona and the Court having considered the pleadings in the action, the memorandums, motions, exhibits and affidavits relating thereto and having heard oral argument and having determined that there is no genuine issue of fact to be submitted to the trial court, the Court finds: that the plaintiff was engaged in the business activity of mining and was not engaged in the business activity of smelting; that ore was produced by the mining and shipped by rail to smelters in Arizona according to terms of contracts which committed the products of the smelters to be shipped to refineries out of the State of Arizona for refining, and returned to the plaintiff at locations out of the State of Arizona; that the refined copper was sold out of the State of Arizona.

The Court concludes that the copper concentrates and precipitates involved entered interstate commerce when they were placed on rail cars for shipment to smelters and that the tax levied under Sections 42-1309, 42-1310, 42-1311, and 42-1316 of the Arizona Revised Statutes should be based on the value of the products when placed in cars for shipment to the smelters and that plaintiff is entitled to judgment against the defendants as prayed.

IT IS, THEREFORE, ORDERED that the plaintiff be granted judgment as follows:

1. For a credit of $577.49 against any future tax under the Act owed by plaintiff.

2. For the sum of $1,463.58 and the sum of $63,774.38 together with interest at the rate of 6% per annum from the 3rd day of February, 1969, until paid.

3. For its costs.

Dated this 6th day of December, 1977.

ROBERT E. McGHEE
Judge Superior Court Aforesaid

APPENDIX C

Section 1, Amendment 14, Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Arizona Revised Statutes

D-1

A.R.S. §42-1309. *Levy of tax; purposes; distribution*

A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§42-1310 through 42-1315.

D-2

A.R.S. §42-1310. *Mining; timber; public utilities and carriers; contractors; newspapers and printing*

The tax imposed by subsection a of §42-1309 shall be levied and collected at the following rates:

* * *

2. At an amount equal to one per cent of the gross pro

ceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

(a) Mining, quarrying, smelting, or producing for sale, profit or commercial use, any oil, natural gas, limestone, sand, gravel, copper, gold, silver or other mineral product, compound or combination of mineral products, or felling, producing or preparing timber or any product of the forest for sale, profit or commercial use.

D-3

A.R.S. §42-1311. *Removal of natural resources by mining or lumbering; service or manufacturing charge*

A. In the case of persons engaged in the businesses classified in subdivision (a) of paragraph 2 of §42-1310, the rate shall be applied to the value of the entire product mined, quarried, produced, felled or prepared for sale, profit or commercial use in this state, regardless of the place of sale of the product or of the fact that deliveries thereof may be made to points without this state.

B. In the case of persons engaged in the businesses classified in subdivision (a) of paragraph 2 of §42-1310, whose incomes, wholly or in part, are derived from service or manufacturing charges instead of from sales of the products manufactured or handled, the rate shall be applied to the gross income of such persons derived from such service or manufacturing charge.

D-4

A.R.S. §42-1316. *Shipment or sale of certain products outside state; valuation for assessment of tax*

If any person engaging in any business classified in subdivision (a), paragraph 2 of §42-1310 ships or transports products, or any part thereof, out of the state without making sale of such products, or ships his products outside of the state in an unfinished condition, the value of the products or articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce shall be the basis for assessment of the tax imposed by paragraph 2 of §42-1310, and the commission shall prescribe equitable and uniform rules for ascertaining such value.

APPENDIX E

E-1

2.2.6 ORE SHIPPED OUT OF STATE.

Any mined, quarried or produced mineral product, compound, or combination transported out of the state without making a sale of such product is subject to tax at the one percent rate upon the value of the ore or other product before it enters interstate commerce. The value shall be the market price before shipment or the sale price when sold, less the cost of freight and cost of finishing the product when included in the sale price.

E-2

2.2.6 ORE SHIPPED OUT OF STATE.

Any mined, quarried or produced mineral product, compound, or combination transported out of the state without making a sale of such product is subject to tax at the one percent rate upon the value of the ore or other product before it enters interstate commerce. The value shall be the price before shipment or the sale price when sold, less the cost of freight and the cost of finishing the product when performed outside of Arizona and included in the sale price. (As amended December 26, 1965.)

APPENDIX F

XIV.

That insofar as Plaintiff paid charges for the service of smelting its concentrates or precipitates in the State of Arizona, such service charges received by said smelters were subject to the tax under the Act at the same rate applied to the business of mining except that the rate was applicable to the gross income of such smelters derived from such service charge rather than to the value of the product. Plaintiff is informed and believes, and alleges on information and belief, that such service charges or fees paid by it to the smelters include an allowance for the amount of taxes due from said smelters under the Act.

* * *

XV.

That said additional tax assessment in the amount of $63,804.39 against Plaintiff was and is erroneous, invalid, illegal and void by reason of the matters and things hereinabove alleged, and for the reasons following, to wit:

* * *

8. Denial of a deduction to Plaintiff for smelter charges incurred in the State of Arizona willfully, arbitrarily, wrongfully and illegally discriminates against Plaintiff in favor of the owners and operators of other producing mines making copper concentrates and having their own smelters in that such mines having their own smelters are only taxed

once on the increment of value added to the copper concentrates or precipitates, while Plaintiff is in effect taxed twice on the same increment of value. Not only does the disallowance of Plaintiff's smelter charges in computing the value subject to tax unduly burden interstate commerce but in addition such disallowance discriminates against interstate commerce and against Plaintiff and denies Plaintiff the equal protection of the law under the Constitution of the United States and the State of Arizona.

APPENDIX G

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Attorneys for
Plaintiff/Appellee

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA CIV 2867
(Gila County Superior Court
Case No. 15,651-B)

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,
Plaintiff/Appellee

vs.

STATE TAX COMMISSION OF THE
STATE OF ARIZONA,
Defendant/Appellant

FIRST AMENDED MOTION FOR REHEARING

Appellee MIAMI COPPER COMPANY, hereinafter referred to as "taxpayer," pursuant to Rule 22 of the Rules of Civil Appellant Procedure, hereby requests a rehearing of the above matter for the reason that the Court of Appeals' decision was based upon an erroneous interpretation of the operative tax statutes and legislative intent, with the result that taxpayer is now subject to double taxation, is denied

equal protection under the laws of the state and federal constitutions, and is subject to an interpretation of the Arizona tax statutes which we believe is in direct violation of the uniformity clause of the state and federal constitutions. Constitution of Arizona, Art. 2 §3 and Art. 9 §1; U.S.C. Const. Amend. 14, Sec. 1.

The Gila County Superior Court had held that the value of the taxpayer's mining product as it passed out of the state for eventual sales was not to include custom smelting charges incurred with Inspiration Consolidated Copper Company and Phelps Dodge Corporation. The Court of Appeals reversed this decision by holding that the value of the product, including the smelting charges, was a proper measure for the tax to be paid by taxpayer in the form of its transaction privilege tax. Such was the court's decision, even though the smelting of the concentrates and precipitates produced by the taxpayer was performed by an entirely different company at a separate location, and even though the smelting company was itself a taxpayer paying a transaction privilege tax upon the charges it imposed for its services in performing the smelting operation on behalf of this taxpayer.

The result of this court's decision may be best illustrated by using numbers. If it is assumed that the concentrates from the mine have a value of 25X, and it is further assumed that the smelting of these concentrates has a value of 25X, then the tax results of the court's decision may be illustrated as follows:

CUSTOM SMELTING (paid by smelter but charged to taxpayer)	25X
VALUE OF THE PRODUCT AS IT LEAVES THE STATE (concentrates 25X; smelting 25X)	50X
TOTAL TAX BASIS FOR TAXPAYER'S PRODUCT	75X

This result should be contrasted with that of an integrated operator such as Inspiration. If again the same values are assumed, the tax results of concentrates mined by Inspiration and smelted in its own smelter and then shipped out of the state are as follows:

CONCENTRATES	25X
SMELTING	25X
TOTAL TAX BASIS FOR INSPIRATION'S PRODUCT	50X

This result is not uniform, is not equitable, and it is submitted as incorrect.

The theory of the transaction privilege tax is to "levy upon a person who is exercising the privilege of engaging in an enumerated business." However, the tax is designed to have each transaction or activity taxed only once. *Carriage Trade Mgt. Corp. v. Arizona Tax Com'n.*, 27 Ariz.App. 584, 557 P.2d 183 (1976). The end result is that when the product is finally sold (or transported out of the state) there has been only one tax on the various values added to the product in the State of Arizona. This is accomplished through various exemptions and deductions. There are many illustrations; a few are as follows:

1. If RBO Chevrolet Company takes a Chevrolet Van (worth 25X) to a custom shop for extensive re-modeling (worth 25X), the results are as follows when the vehicle is sold:

Bare vehicle value	25X
Customizing value	25X
TAX BASIS	50X

The 25X paid by RBO Chevrolet to the custom shop is *not* taken into custom shop's gross income for transaction tax purposes because it is a sale for resale. Department Regs. R15-5-1811A[1] and 15-5-1839A.

2. Likewise, a contractor engaged in the contracting business in Arizona, such as PAT Homes, has the following tax results from the building and selling of a home:[2]

It is taxable on its gross income from contracting. Department Reg. R15-5-617C. However, it gets to deduct the amounts paid for labor and to sub-contractors. Department Regs. R15-5-624.1 through 626. The contractor claims an exemption when he purchases materials to incorporate into the home. A.R.S. §42-1321.3. The end result is that the selling price for the home has been taxed as follows:

The sub-contractor pays a tax on his gross income;

[1]All Department Regulations hereinafter cited are set forth in appendix attached.

[2]The 1978 Legislature made extensive changes in the Contractors Privilege Tax. Such changes are not relevant to the argument here.

The home builder, through the contracting classificiation, is taxable on the materials and equipment going into the home, plus his profit.

The ultimate taxpayer, of course, is the home buyer, but he has only been taxed once on the various materials, equipment and products going into the home.

This latter illustration is well documented in the case of *Arizona State Tax Com'n. v. Staggs Realty Corp.*, 85 Ariz. 294, 337 P.2d 281.

It is important to note that the Court in *Staggs Realty, supra,* excluded the contractor's business activities from the value attributed to the real estate company even though the latter taxpayer maintained ownership of the taxed property *before and after* construction. It is apparent then that continued ownership is not a critical factor that would preclude the deduction being requested by the present taxpayer.

The result of the court's decision in this case is, then, as follows: This taxpayer is being discriminated against and there is a lack of uniformity as to other taxpayers in the state and as to taxpayers engaged in the identical business of this taxpayer. *White v. Moore,* 46 Ariz. 48, 46 P.2d 1077, 1081 (1935); *Shaw v. State,* 8 Ariz. App. 447, 447 P.2d 262, 266 (1968). The total inequity of the situation may be further illustrated by a hypothetical in which it is assumed that the taxpayer, instead of having Inspira-

tion custom smelt its concentrates, sells its concentrates to Inspiration who then smelts the ore and ships it out of the state. Upon transportation of the smelted product out of the state, Inspiration would claim a deduction for the sums paid to taxpayer for the concentrates. Department Regs. R15-5-904B (prior Reg. 2.2.5). Using our former illustration, the results of this transaction would be as follows:

TAX ON CONCENTRATE SALE		25X
VALUE OF THE PRODUCT AS IT LEAVES THE STATE	50X	
DEDUCT COST OF CONCENTRATES	(25X)	25X
TOTAL TAX BASIS		50X

Here is an illustration, then, of a taxpayer not being saddled with double taxation for the same ore which received the same treatment by the same person. Yet if the same or different taxpayer merely contracts with the smelter double taxation comes into play. This cannot be the result intended by the legislature or by this court. *See Brophy v. Powell,* 58 Ariz. 543, 551, 121 P.2d 647 (1942).

A literal application of Section 1316 to the taxpayer in this case is impossible. On its face, the person performing the smeltering service (Inspiration) is the one upon whom the tax is literally imposed:

> "If any person engaging in any business classified in Subdivision (a), paragraph 2, of Section 42-1310 *ships or transports products* or any part thereof out of the state without making sale of such products or ships his products outside of the state in an unfinished condition . . ."
> (Emphasis added).

Herein the smelterer does ship and transport the product out of the state without making sale thereof. It does not ship "his products," which is the alternate basis of valuation. But neither does appellee ship "his products" out of state. Appellee ships the products only to the operator of the smelter, who thereafter is the shipper within the apparent meaning of Section 1316. Therefore, under the language of the statute, the smelterer should be taxed on the entire value as shipped by it, notwithstanding that the product is owned by Miami Copper. However, as a matter of fact, Miami Copper has been so taxed, but not the smelterer. This result cannot be justified under the language of the statute.

The State, in its brief, confesses there may be some form of double taxation in this case, but contends it is not a form of double taxation prohibited by case law. (Appellant's Opening Brief, Pages 45, 46). The double taxation involved, however, is not between smelting in Arizona and smelting out of Arizona. It is the fact that under this Court's decision Miami Copper pays a tax for smelting twice when it arranges for custom smelting in Arizona and as we have stated, this is a situation that does not apply to integrated operations or to mine operators that sell to the smelter.

The legislature expressed its intent rather well in the statute involved:

> "A.R.S. §42-1316. Shipment or sale of certain products outside state; valuation for assessment of tax.
>
> If any person engaging in any business classified in subdivision (a), paragraph 2 of §42-1310 ships or transports products, or any part thereof, out of the state without making sale of such products, or ships his products outside of the state in an unfinished condition, the value of the products for articles in the condition or form in which they existed when transported out of the state and before they enter interstate commerce shall be the basis for assessment of the tax imposed by paragraph 2 of §42-1310, and *the commission shall prescribe equitable and uniform rules for ascertaining such value.*"
>
> (Emphasis added).

The Department (Tax Commission) has obviously not prescribed equitable and uniform rules for the value of the taxpayer's custom smelted ore. There would appear to be no legislative or logical reason to impose double taxation on Miami Copper just because it doesn't have its own smelter or because it decides to have a third party perform a smelting service.

This is a totally different situation from the case which the court in its opinion cited for comparison purposes; *Boise Bowling Center v. State,* 93 Idaho 367, 461 P.2d 262 (1969). A careful reading of that opinion underscores the fact that it has no application to the present facts on appeal. The Idaho Supreme Court specifically noted that they were dealing with two distinct transactions

which happened to occur simultaneously. Moreover, the court was careful to point out that the first transaction (proprietor's rental of pin setting equipment from A.M.S.) related to the privilege of renting tangible personal property within the state, while the second transaction (sale of bowling services by the proprietor to his customers) related to the privilege of using bowling facilities for recreational purposes, (*"a unique combination of property and services."*) 461 P.2d at 265. In the first instance, the transaction related solely to the pin setting equipment, while in the second transaction, the recreational facilities purchased by the patrons of the bowling establishment included the use of a building, furnishings of restaurant facilities, furnishing of bowling lanes, balls, and also the pin setting equipment.

In comparison the facts presently on appeal present a situation of identical services and in fact the same transaction (smelting of Miami Copper's precipitates and concentrates) being taxed twice. The same person is being taxed for the same privilege which does constitute double taxation since "the same property or person is taxed twice for the same purpose for the same tax period by the same tax authority . . ." *Milwaukee Motor Transportation Co. v. Commissioner of Taxation,* 193 N.W.2d 605, 612 (Minn. 1971).

Admitting the State's prohibition of double taxation, this Court adopted the statement of what constitutes double taxation as proposed by the Minnesota Supreme Court

in *Milwaukee Motor, supra.* The Arizona Supreme Court, however, has redefined double taxation so as to encompass the situation now on appeal. In the ad valorem tax case of *Brophy v. Powell,* 58 Ariz. 543, 551, 121 P.2d 647 (1942), Chief Justice Lockwood rejected the limited definition of double taxation advanced in the Attorney General's Opening Brief (at pages 45-46):

> ". . . The technical legal interpretation adopted by most of the courts when considering constitutional prohibitions against double taxation means taxing twice for the same purpose in the same period the same property in the same taxing area. Cooley on Taxation, 4th Ed., par. 223. And it is generally held by the courts that the taxing of two different interests in the same property is not obnoxious to constitutional or statutory provisions against double taxation, even though they may represent a duplication of the same fundamental values. Thus it is very generally held that both the physical property of a corporation and the shares of stock of the corporation in the hands of the stockholders may be taxed without violating a provision against double taxation. Our legislature, however, very early adopted *the popular and common sense view of the meaning of "double taxation," which is to the effect that it applies to any case where the same intrinsic values are taxed twice even though the legal and ultimate equitable titles thereto might be in separate and independent hands."* (Emphasis added).

There can be no factual dispute that in the instant case the same intrinsic value (smelting) has been taxed twice. (Complaint Par. XIV, Amended Answer, Par. III.)

The Court will recall that the Attorney General

sought to justify the present incident of double taxation by referring to the case "where a taxpayer pays a tax on dividends after a corporation has already paid the tax on its net income." Appellant's Opening Brief, at 46). Whatever the relevancy of presenting an example of *income taxation,* there has never been any question but that state and federal income tax law allows such a revenue generating practice. The fact remains, nonetheless, that the present facts on appeal involve the "same intrinsic values," or the same transaction being taxed twice, which is in direct violation of this state's taxation policy as set forth in *Brophy v. Powell, supra.*

The Arizona Court of Appeals decision of *Carriage Trade Mgt. Corp., supra,* notes that taxpayers subject to the transaction privilege tax normally pass on the tax levied to their customers as any other cost is passed on. Therefore, "each business in question is being taxed only once," 27 Ariz. App. at 587. As a result of the present court decision which effectively taxes the identical smelting operations twice, the contemplated passing on of the transaction privilege tax liability can only be exercised by the smelting company to the detriment of its customer, Miami Copper.

The unlawful burden upon this taxpayer as a result of levying the same transaction privilege tax upon both Miami Copper and the smelting company is underscored when a comparison is made between this taxpayer's position in the mining industry of Arizona as compared to

those mining companies in Arizona who have their own smelting operations. Because of this court's decision, Miami Copper is now denied protection of the law and a nonuniform application of the statutes. The court's opinion (at page 7) acknowledges that "[t]he constitutional obligation of Arizona is to treat equally essentially similar activities carried on within its borders." *See also, Duhame v. State Tax Commission,* 65 Ariz. 268, 179 P.2d 252 (1947) (State tax statutes may not be interpreted to discriminate among taxpayers and deny them equal protection of the law).

The practical effect of this court's decision is to give a distinct advantage in the market place to those mining companies in Arizona (such as Phelps Dodge or Inspiration Copper) that have their own smelting operations and thus are not forced to seek smelting from another company such as Miami Copper. Because of the court's decision, the same amount of ore mined and smelted in Arizona is subject to different tax treatment to the economic benefit of an integrated corporation with its own smelting operations.

* * *

CONCLUSION

The relevant statutes and regulations should be interpreted so that there is uniformity and nondiscrimination. It is discriminatory to have a different taxing method for taxpayers producing identical products just because one

taxpayer owns its own smelter and the other does not and uses a third party. It is discriminatory to this taxpayer to have a different method of computing tax based upon whether it sells its product to the smelter or whether it hires the smelter. It is evident that the tax statutes have never contemplated the double taxation which is now impressed upon Miami Copper. The large, integrated mining company with its own smelter is able to avoid such a multiple tax burden. There is no explanation as to why the present taxpayer, and those other mining companies in a similar position, should be singled out to suffer double taxation and be denied the benefit of the equal protection of laws and uniform application of the tax statutes.

Therefore, Miami Copper requests the Court of Appeals to reconsider it decision of September 20, 1978 and to permit if necessary additional oral argument and presentation of supplemental briefs by the parties.

Respectfully submitted,

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Served by mail this 24th day of
October, 1978:

JOHN A. LaSOTA, JR.
THE ATTORNEY GENERAL
James D. Winter
Chief Counsel — Tax Division
Office of the Attorney General
State Capitol
Phoenix, Arizona 85007
Attorneys for Defendant/Appellant

APPENDIX H

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CIV 2867

(GILA County
Superior Court
Cause No. 15,651-B)

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,
Plaintiff/Appellee,

v.

STATE TAX COMMISSION OF THE STATE
OF ARIZONA,
Defendant/Appellant

ORDER

IT IS ORDERED that the Appellee's Motion for Rehearing is hereby DENIED.

Dated: November 22, 1978.

(s) James L. Richmond,
Chief Judge

(s) James D. Hathaway,
Judge

(s) Lawrence Howard,
Judge

Copies of the foregoing order mailed
this 22 day of November, 1978,
to:

James R. Malott, Jr.
MORRIS & MALOTT
P.O. Box 351
Globe, Arizona 85501

Hon. John A. LaSota, Jr.
The Attorney General
State Capitol Building, West Wing
1700 West Washington Street
Phoenix, Arizona 85507
Attn: James D. Winter
Assistant Attorney General

APPENDIX I

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CIV 2867
(Gila County
Superior Court
Cause No. 15,651-B)

MIAMI COPPER DIVISION,
TENNESSEE CORPORATION,
Plaintiff/Appellee,

vs.

STATE TAX COMMISSION OF THE STATE
OF ARIZONA,
Defendant/Appellant

PETITION FOR REVIEW

Appellee petitions the Supreme Court of Arizona to review the decision of the Court of Appeals in this matter. Appellee's motion for rehearing in the Court of Appeals was denied on November 22, 1978.

DATED this 28th day of November, 1978.

Respectfully submitted,
MORRIS & MALOTT
By James R. Malott, Jr.
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WARNOCK & DOLPH, P.C.
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Copies of the foregoing
mailed this _____ day of
November, 1978 to:

John A. LaSota, Jr.
THE ATTORNEY GENERAL
James D. Winter
Chief Counsel, Tax Division
Office of the Attorney General
State Capitol
Phoenix, Arizona 85507
Attorneys for Defendant/Appellant

APPENDIX J

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

December 13, 1978
Supreme Court
No. 14080-PR

Court of Appeals
No. 2 CA-CIV 2867

Gila County
No. 15651-B

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,
Appellee,

vs.

STATE TAX COMMISSION OF THE
STATE OF ARIZONA,
Appellant

The following action was taken by the Supreme Court of the State of Arizona on December 12, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 13th day of December, 1978.

CLIFFORD H. WARD, Clerk
By Anna L. Cates
Deputy Clerk

TO: Hon. John A. LaSota, Jr., Attorney General, 200

State Capitol Building, Phoenix, Arizona 85007
Attn: James D. Winter, Esq.
James R. Malott, Jr., Esq., Morris & Malott, P.O. Box 351, Globe, Arizona 85501
David W. Richter, Esq., Bilby, Shoenhair, Warnock & Dolph, P.O. Box 871, Tucson, Arizona 85702
Hon. Robert E. McGhee, Judge, Gila County Superior Court, Gila County Courthouse, Globe, Arizona 85501
Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

APPENDIX K

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF GILA
No. 15,651-B

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,
Plaintiff,

vs.

STATE TAX COMMISSION OF ARIZONA,
Defendant

PLAINTIFF'S CROSS-MOTION FOR
SUMMARY JUDGMENT

COMES NOW the Plaintiff MIAMI COPPER COMPANY DIVISION, TENNESSEE CORPORATION (presently CITIES SERVICE COMPANY by reason of a merger) and pursuant to Rule 56, Arizona Rules of Civil Procedure moves for summary judgment against the Defendant STATE TAX COMMISSION OF ARIZONA (now the DEPARTMENT OF REVENUE) for the relief demanded in the Complaint upon the ground that there is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law. This Motion is supported by the Memorandum attached hereto and the pleadings on file herein, the exhibits attached to the Defendant's Memorandum in support of Defendant's Motion for Summary Judgment, and Plaintiff's Memorandum and exhibits attached thereto in response to Defendant's Motion for Summary Judgment.

DATED this 11th day of November, 1976.

MORRIS & MALOTT
By James R. Malott, Jr.
P.O. Box 351
Globe, Arizona 85501
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

The State having filed its Motion for Summary Judgment and its Memorandum in support thereof, and the Plaintiff, hereinafter called "Taxpayer," having filed its Response to said Motion, all of the various contentions of the parties have previously been presented. Accordingly, Taxpayer assumes it is unnecessary to restate the facts and arguments heretofore set out in detail. Taxpayer submits that it is entitled to summary judgment in its favor on the same facts relied on by the State with the difference being in the interpretation and application of the law to those facts. Taxpayer proposes only to summarize herein the principal points set out in detail in its Response to Defendant State's Motion for Summary Judgment and relies upon the same in support of its Motion as if fully set forth herein. Under Taxpayer's construction and interpretation of the statutes and regulations, in-state smelting charges are deductible from out of state sale prices in determining the value of Taxpayer's products for transaction privilege tax purposes, while State contends the reverse is true.

* * *

5. To construe Section 42-1309 imposing the transaction privilege tax in connection with Sections 42-1311 and 42-1316 as contended by the State so as to include in state smelting charges in the value of Taxpayer's product for transaction privilege tax purposes would deny Taxpayer the equal protection of the law. It is the only taxpayer within any classification whose volume of business for privilege tax purposes includes the business of another taxpayer.

APPENDIX L

Originally, Appellee asserted that it was discriminated against and hence denied equal protection because those taxpayers who chose to have their smelting out of the state would not be assessed the same tax. This, of course, does not mean that the State has discriminated for the reason that the tax is measured by the value of the product as it leaves the State and those mineral producers whose products leave the State prior to smelting would not be taxed upon the additional value caused by the smelting. This is merely the result of the manner in which the two different hypothetical taxpayers choose to do business. It is not the denial of equal protection.

Appellee additionally now asserts that it is denied equal protection of the laws and is discriminated against because it is being taxed more than mineral producers who do their own smelting. This simply is not the case as can be seen from the above hypothetical. Aside from the fact that mineral producers who do their own smelting are transacting their business in a different manner which could validly have different tax consequences, both the Appellee who contracts out a portion of its business and the mineral producer who performs its own smelting and then sells its products outside the State have the measure of the tax based on the value of the product as it leaves the State. This is not a denial of equal protection. The tax base for each taxpayer is the value of its product as it leaves the State. Those taxpayers who in addition to smelting their own

products perform custom smelting for others are taxed separately under their business of custom smelting. The tax that is imposed as a result of their custom smelting is not a tax upon those taxpayers as producers of their own mineral products. That custom smelters may pass along the burden of the tax imposed upon them to their customers, as do most taxpayers, does not result in denial of equal protection as all taxpayers in the same circumstance are treated equally.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1381

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,

Petitioner,

vs.

STATE TAX COMMISSION OF THE
STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA, DIVISION TWO

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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INTRODUCTION

A. Question Presented

Respondent disagrees with Petitioner's statement of questions presented. The only question presented in Petitioner's brief is whether Respondent's administration of the relevant transaction privilege tax provisions, pursuant to which an additional assessment for transaction privilege taxes was made, denies Petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

B. Statement of Facts

The tax at issue is imposed upon the privilege of engaging in the business of mining, quarrying, smelting, or producing for sale, profit or commercial use various mineral products. Arizona Revised Statutes Sections 42-1309(A) and 42-1310 (2)(a). The amount of the tax is gener-

ally measured by the gross proceeds of sales or gross income from the business. If, however, the mineral product is shipped or transported out of state without being sold, or shipped out of state in an unfinished condition, then the value of the product as it existed when transported out of state, and before it enters interstate commerce, is the basis upon which the transaction privilege tax is measured. A.R.S. § 42-1316.

The Petitioner is engaged in the business of mining and producing copper for profit or commercial use. (Petitioner's brief, p. 13.) The Arizona Court of Appeals found that Petitioner's business extended to services required to prepare its mineral products for their intended sale, even if some of these services were performed by others under contract. (Pe-

titioner's Brief, p. 5a[1])

In conducting its business activities, Petitioner extracts copper concentrates and copper precipitates from its mines in Arizona. These materials are then delivered to the Inspiration Consolidated Copper Company and the Phelps Dodge Corporation to be smelted for a per-ton fee, thereby producing blister copper. The blister copper is then shipped directly outside of Arizona for further refining. The per-ton smelting fee was not based upon the increase in value of the ore caused by the smelting.

In computing the additional assessment, the Respondent included in the

1. A minor typographical error exists in Petitioner's Appendix "A" at pp. 4a and 5a. The proper citation to the definition of "business" in the Arizona transaction privilege tax code is "A.R.S. § 42-1301" rather than "A.R.S. § 14-1301." See 589 P.2d at 26, 27.

transaction privilege tax base the value of the blister copper, i.e. the value of the copper ore after smelting. The Respondent included no other value or amount in Petitioner's taxable base.

A.R.S. § 42-1310(2)(a) also applies to the business of smelting for profit or commercial use various mineral products. Consequently, the per-ton smelting fee that was paid by Petitioner to Inspiration Consolidated Copper Company and to the Phelps Dodge Corporation was includable in the tax base of Inspiration and Phelps Dodge respectively. Any transaction privilege tax measured by such per-ton smelting charges would have been imposed upon and paid by Inspiration and Phelps Dodge.

The Petitioner, during the taxable periods in question, attempted to deduct from its own taxable base the per-ton smelting fee it had paid to Inspiration

and to Phelps Dodge. Petitioner contended that since the smelting fee was includable in the taxable base of Inspiration and Phelps Dodge, and since Petitioner's taxable base included the increase in the value of the copper as a result of the smelting, to deny it a deduction for such smelting charges would in effect constitute double taxation of the same increase in value.

Petitioner further argued that, since most taxpayers pass on the economic burden of their transaction privilege tax, it was in effect required to pay more taxes than integrated companies that operated not only their own mines but also their own smelting facilities. Since such integrated producers built their own smelting facilities, they did not contract for smelting services and thus no separate tax would be imposed as a result of any smelting charges.

The trial court held that the copper concentrates and precipitates entered interstate commerce when such materials were placed on rail cars for shipment to the smelters. Therefore, the taxable value should have been determined prior to smelting.

The Arizona Court of Appeals reversed the trial court and held that the materials did not enter interstate commerce at any time prior to the completion of the smelting process in Arizona. Since the interstate commerce question was not raised in Petitioner's brief, that issue is not before this Court.

The Court of Appeals also concluded that no "double taxation" was involved in the assessment, and that the equal protection of the laws was not denied Petitioner. The Petitioner thereafter petitioned for review in the Arizona Supreme Court, which petition was denied. Peti-

tioner then filed this Petition for Writ of Certiorari.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. Petitioner's Argument

A writ of certiorari might be granted by the Supreme Court in situations where a state court has decided a federal question of substance not previously determined by the Supreme Court, or where a state court has decided such question not in accordance with prior applicable decisions. U.S. Sup. Ct. Rule 19(1)(a). Neither standard is applicable in this case.

On page 10 of its brief, Petitioner argues that under the decision of the Arizona Court of Appeals, the Petitioner's copper, which is smelted by contract in Arizona, must enter the market for such products subject to the transaction privilege tax being imposed twice on the value added thereto by smelting.

In contrast, Petitioner argues, a taxpayer which has integrated mining and smelting activities only pays the transaction privilege tax on the value of such products attributable to smelting but once. On the basis of this argument, Petitioner contends that it has been denied the equal protection of the laws guaranteed to Petitioner by the Fourteenth Amendment to the United States Constitution.

B. Petitioner Misconstrues the Operation of the Transaction Privilege Tax

Contrary to Petitioner's contention, the increase in value of Petitioner's copper is not subject to taxation twice. A.R.S. §§ 42-1310 and 42-1316 require the imposition of the transaction privilege tax to be measured by the value of the copper shipped out of state, whether the taxpayer contracts the smelting of its copper to a separate entity or performs

the smelting itself. The transaction privilege tax provisions make no distinction based on the manner in which the copper is smelted. Furthermore, neither taxpayer is permitted to deduct smelting expenses incurred in Arizona, whether such expenses consist of contractual payments to an independent smelter, or the initial investment, and maintenance and operating expenses of companies that have their own smelters. Consequently, Petitioner is treated no differently than any other producer of mineral products for sale or commercial use.

It is true that contract smelters that smelt copper for other producers must include in their own taxable base the gross income they receive from such smelting activities. That does not necessarily mean, however, that a tax is imposed twice on the value added to the copper by smelting.

As has been previously stated, Petitioner's transaction privilege tax is measured by the value of the copper it produces in Arizona, including the value added to the ore by smelting. The independent smelter's tax base, however, is measured by the per-ton smelting fee it receives pursuant to the contract with Petitioner. There is nothing in the record to indicate that such smelting fee is based in any way on the value added to the copper by smelting.[2]

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2. While the record is not clear on this point, it is possible that the blister copper does not have a readily ascertainable market value. Therefore, Petitioner may be assuming that the cost of smelting the copper reasonably approximates the increase in the value of the copper as a result of the smelting. This still would not mean that an independent smelter's tax base corresponds to the increase in value of the copper, as is asserted by Petitioner. Whether the cost of smelting copper does reasonably approximate the increase in the value of such copper is, of course, a question of state law.

The transaction privilege tax measured by the smelting fee is imposed on and paid by the company engaged in the business of smelting. It is possible, however, for the expense of this tax to be passed on by the smelter to Petitioner, like any other expense may be, as a component of the flat per-ton smelting fee. This passing on of the economic burden of the tax does not mandate that the Arizona Legislature provide a deduction to Petitioner for its contractual smelting fees incurred in Arizona. In not providing for such a deduction, the Legislature may have determined that since integrated companies are not permitted to deduct their own smelting expense incurred in Arizona, such as depreciation, maintenance, property taxes, and other operating expenses, companies such as petitioner will not be permitted to take a similar deduction for their own smelting expenses. Consequently, Petitioner is not being treated differently from other integrated companies, and therefore no denial of equal protection can exist.

C. The Arizona Court of Appeals' Decision is Not Contrary to Prior Decisions of this Court.

Since Petitioner's Arizona smelting expenses may be composed of different items than the smelting expenses of integrated companies in Arizona, Petitioner asserts that it is denied the equal protection of the laws. The authorities cited by Petitioner, however, do not support this assertion.

Respondent agrees that in the exercise of their taxing powers, the states are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But in the field of taxation, the states have a wide latitude in selecting the subjects of taxation. As this Court stated in Lehnhausen v. Lake Shore Auto

Parts Co., 410 U.S. 356 (1973) at 359:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. (Citation omitted.) Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have a large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

Later in the opinion in Lehnhausen v. Lake Shore Auto Parts Co., supra, in reviewing Madden v. Kentucky, 309 U.S. 83 (1940), where this Court upheld an ad valorem tax of 50 cents per $100.00 on out-of-state deposits, while only imposing a tax of 10 cents per $100.00[3] on deposits within the State, this Court stated, 410 U.S. at 364:

> "The classification was sustained against the charge of invidious discrimination, the Court noting that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification' Id., at 88. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' Ibid. And the Court added, 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'"

Based upon the foregoing analysis, this Court upheld the Illinois personal property tax on the property of corporations even though no similar tax was levied on the property of individuals.

Because of the wide discretion given to the States in selecting the subjects of taxation, this Court has upheld various taxing schemes that in some way favored one group of taxpayers over another. In

3. The tax on deposits within Kentucky was 10 cents per $100.00, but a typographical error in the Lehnhausen decision, supra, 410 U.S. at 364, describes it as a tax of 10 cents per $1,000.00.

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923), this Court upheld an occupation tax on persons engaged in the business of mining or producing ore on their own account, i.e. as owner or lessee. In Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), this Court upheld a gross receipts tax that was imposed on persons engaged in the business of wholesale sale of coal oil, naphtha and other mineral oils, even though no such tax was imposed on wholesalers of other articles such as sugar, bacon, coal and iron. In Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), this Court upheld a tax imposed on property stored or kept on hand as merchandise, even though merchandise and agricultural products belonging to a nonresident, if held in a storage warehouse for storage only, were exempt.

Finally, in American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900), this

Court upheld a license tax imposed on manufacturers engaged in the business of refining sugar, even though planters and farmers grinding and refining their own sugar and molasses were exempt. In upholding the classification, the Court stated, 179 U.S. at 92:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid."

After reviewing numerous cases where various classifications were upheld as not denying equal protection, this Court concluded, 179 U.S. at 95:

> "The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class.... The discrimination is obviously intended as an encouragement to agriculture,

and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

From the foregoing cases, it is clear that if a classification for tax purposes is based upon a reasonable distinction, and everyone within a class is treated equally, there is no denial of equal protection. Consequently, even if the Arizona transaction privilege tax provisions were to make a distinction between companies such as Petitioner, and integrated companies, such distinction would have been reasonable. Companies such as Petitioner do not incur the capital outlay and other related expenses of owning and operating a smelter. Also, companies such as Petitioner do not bear any added property tax burden that may be associated with owning and operating smelting facilities. But as Petitioner states on page 12 of its brief, it has never been its con-

tention that the transaction privilege tax provisions were unconstitutional on their face. Therefore, the foregoing cases cited by Petitioner are not relevant here.

D. The Transaction Privilege Tax Provisions Were Not Administered by Respondent in a Discriminatory Manner.

Petitioner argues on page 13 of its brief that while the Arizona statute might appear fair and impartial on its face, the State has purportedly administered said statute in such a way as to place a burden on Petitioner not placed on other taxpayers within the same class. Petitioner further states in its argument that unlike integrated companies that do their own smelting, Petitioner is burdened with its payment of the transaction privilege tax based on the total value of its copper, which included the increment of value added by smelting, and with the added economic effect of the imposition of a transaction privilege tax on the smelting con-

tractor measured by the same increment of value.[4]

In support of its argument, Petitioner cites Yick Wo v. Hopkins, 118 U.S. 356 (1886), Weissinger v. Boswell, 330 F. Supp. 615 (M.B. Ala. N.D. 1971), and Delaware L. & W. R. Co. v. Kingsley, 189 F. Supp. 39 (D. N.J. 1960), for the proposition that if a statute, fair on its face, is unfairly or discriminatorily applied, then such application of the statute may be in violation of the Equal Protection Clause of the Constitution. A review of these cases will illustrate that they are distinguishable from this case.

4. This is Petitioner's characterization of the measure of the tax imposed on the smelting contractor. As Respondent has previously pointed out, however, the measure of the tax for the smelting contractor is not the added increment in value, but its gross income derived from the business of smelting; that is, the flat per-ton smelting fee it receives from Petitioner.

Yick Wo v. Hopkins, supra, was a criminal case involving the validity of an ordinance that gave the Board of Supervisors of the City and County of San Francisco the authority to refuse permission to carry on a laundry business except when located in a building of brick or stone. Any such refusal could be exercised by the Board completely at its own discretion. The facts of the case revealed that, with one exception, only members of the Chinese race were refused permission to carry on a laundry business in a wood building. Based on the foregoing facts, this Court held that the arbitrary and discriminatory actions of the Board were in violation of the Equal Protection Clause.

Both Weissinger v. Boswell, supra, and Delaware L. & W. R. Co. v. Kingsley, supra, involved a situation where even though the relevant statutes provided that all property was to be assessed at its

fair market value, state officials assessed certain properties at a higher percentage of fair market value than other property in the state. The Court in Delaware L. & W. R. Co. v. Kingsley, supra, dismissed the complaint for failure to state a cause of action in view of the fact that the taxpayers had adequate administrative and judicial remedies in the state.

The Court in Weissinger v. Boswell, supra, held that the systematic and intentional refusal of state officials to perform their duties according to the law offended both due process and equal protection. In reaching its decision, the Court stated that while the federal constitution does not prohibit a state from establishing reasonable classes of property and taxing those classes at different rates, if a state has decided that all property shall be taxed in the same way, then any

substantial disparity in taxation as a result of the failure of state officials to properly administer its tax laws will offend Due Process and the Equal Protection Clauses of the Constitution.

In the present case, the record is devoid of any showing that Respondent has not fairly administered the transaction privilege tax provisions. The transaction privilege tax law does not specifically provide for the deduction of smelting expenses. The deductions of such expenses incurred in Arizona are not allowed to companies, such as Petitioner, that contract out the smelting of its mineral product, nor to integrated producers that smelt their own mineral product. Both types of companies are treated fairly and equitably, and within the requirements of the Equal Protection Clause. The fact that the smelting expenses may be composed of different types of expenses does not

transform such expenses into something else.

From the foregoing it becomes evident that not only is Respondent's administration of the transaction privilege tax provisions in compliance with the Equal Protection Clause, but also that if Respondent were to allow Petitioner a deduction for its Arizona smelting expenses, which deduction is not authorized by the statute, the Respondent may be denying the equal protection of the laws to integrated producers who would not be allowed a similar deduction for their Arizona smelting expenses.

In Oliver Iron Mining Co. v. Lord, supra, the taxpayer argued that the occupation tax imposed on persons engaged in the business of mining or producing ore on their own account violated the Equal Protection Clause because royalty payments were allowed as a deduction. Even though

this Court did not decide that question because it was not properly before the Court, this Court did state, 262 U.S. at 180:

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is the amount of royalties paid on the ore mined and produced during the year. This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one, and has not been before the Supreme Court of the State. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment."

Respondent believes that a similar question would be raised if Respondent, without statutory authority, were to allow a smelting expense deduction to companies, such as Petitioner, that contract out their smelting activities, while at the

same time not allowing a similar deduction to integrated producers that perform their own smelting activities.

CONCLUSION

The burden is upon Petitioner to show a denial of equal protection. This Petitioner has failed to do. Petitioner has also failed to show how the decision of the Arizona Court of Appeals or the administration of the transaction privilege tax provisions by the Respondent is in conflict with prior decisions of this Court.

Respondent has shown, however, that under the proper interpretation of the transaction privilege tax privisions, not only has Petitioner been afforded equal protection of the laws, but Petitioner's position might deny other producers the equal protection of the laws. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted this 4th day of April, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 1979, three copies of the MEMORANDUM FOR RESPONDENTS IN OPPOSITION were mailed postage prepaid to

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I further certify that all parties required to be served have been served.

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Attorney General

IAN A. MACPHERSON
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Attorneys for Respondent.

SUBSCRIBED AND SWORN to before me this 4th day of April, 1979.

NOTARY PUBLIC

My commission expires:
August 24, 1982